

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

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HEATHER SMITH, individually and on	:	
behalf of all others similarly situated,	:	
	:	
Plaintiff,	:	Case No. 5:23-cv-00559-D
	:	
v.	:	
	:	
WHALECO INC. d/b/a TEMU,	:	
	:	
Defendant.	:	
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**DEFENDANT’S REQUEST FOR LEAVE TO RESUBMIT
ITS MOTION TO COMPEL ARBITRATION**

Defendant Whaleco Inc., d/b/a TEMU (“Defendant”) hereby respectfully submits this request for leave to submit a revised motion to compel arbitration, in light of additional material facts Defendant has uncovered bearing directly on the issues raised in Defendant’s currently pending Motion to Compel Arbitration (*see* Dkts. 10 and 11), hereafter the “Motion”), and as such respectfully requests that it be permitted to submit a revised motion to compel arbitration accordingly, with these additional facts and related legal arguments presented, within seven (7) days after the Court rules on this request. In support thereof, Defendant states as follows:

1. Defendant filed its Motion on July 25, 2023. *See* Dkt. 10 and 11.
2. On September 28, 2023, Plaintiff filed her response in opposition to the Motion (*see* Dkt. 21). Per the Court’s recent extension order, Defendant’s reply in support of the Motion is currently due on November 9, 2023 (*see* Dkt. 28).

3. Without prejudice to its right to file a reply brief on the aforementioned deadline, to the extent the Court is not inclined to grant the instant request for leave, Defendant hereby respectfully notifies the Court that it has since retained new lead counsel who, together with Defendant and current counsel, have uncovered additional material facts bearing directly on the issues raised in the Motion and Plaintiff's opposition thereto. These facts, which would be presented in Defendant's to-be resubmitted motion to compel arbitration (to the extent this request for leave is granted), indicate Plaintiff agreed to Defendant's "terms of use" multiple times and, in so doing, she expressly agreed to arbitrate her claims against Defendant in this matter on an individual basis and waived her right to seek class treatment, each time. Defendant desires to present this additional information to the Court.

4. In addition, Defendant has learned that it had inadvertently included a different form than the one Plaintiff initially used when she agreed to Defendant's "terms of use" in its current Motion. Defendant also wishes to correct the record in this regard.

5. Therefore, so that Defendant is not prejudiced and does not waive its arbitral rights or need to burden the Court with a successive motion to compel arbitration to present these additional facts and arguments, and so that the Court has a complete record before it when ruling on the Motion, Defendant respectfully requests that it be granted leave to withdraw its current Motion without prejudice and resubmit a revised motion to compel arbitration, including the additional materials and facts regarding Plaintiff and applicable case law relating thereto, for the Court's consideration.

6. On October 20, 2023, counsel for Defendant conferred with counsel for Plaintiff on this request, who indicated that Plaintiff does not agree to this request.

7. Defendant respectfully submits this request for leave should be granted. Firstly, Defendant desires to exercise its arbitral rights and to provide the Court with a complete and accurate factual record and legal bases for compelling Plaintiff to arbitrate her claims. *See Wohlford v. Am. Auto Shield, LLC*, 2023 WL 1107891, at *2 (W.D. Okla. Jan. 30, 2023) (holding that, when deciding a motion to compel arbitration, courts are to apply a summary-judgment-like standard). There is also a national policy heavily favoring arbitration. *See Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009). As such, granting leave to Defendant to resubmit a motion to compel arbitration in this matter, including this additional information, is in the interest of justice for all concerned.

8. Additionally, permitting Defendant leave to revise its Motion will promote judicial and party economy. In this regard, Defendant desires not to burden the Court or Plaintiff with additional motion practice by having to file another motion to compel arbitration after the Court rules on the pending Motion on an incomplete or inaccurate record.

9. This request is made in good faith and not for the purposes of delay. Granting Defendant's request will promote judicial and party economy and is in the interest of justice. Granting this request will not impact the timely resolution of this case, which is in its early stages.

10. Therefore, there is sufficient good cause for granting Defendant's requested leave to file a revised motion to compel arbitration, for at least the reasons stated above.

11. By submitting this request, Defendant does not waive any defenses to the Complaint, the right to seek a dismissal on the merits, or any rights or privileges available to it under applicable rules and law, including jurisdictional defenses, or its arbitral rights.

12. Defendant will submit a proposed order contemporaneously herewith.

WHEREFORE, for all the reasons above, Defendant respectfully requests the Court enter an order granting Defendant leave to resubmit a motion to compel arbitration within seven (7) days of the Court's ruling on this request, along with granting all other relief deemed just and proper.

Dated: October 27, 2023

Respectfully submitted,

SMITH GAMBRELL & RUSSELL LLP

By: /s/ Robert A. Stines

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, a true and correct copy of the foregoing was electronically filed with the Court's CM/ECF system, which will send a notice to all counsel of record.

/s/ Robert A. Stines

Robert A. Stines